

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF NATURAL RESOURCES

In the Matter of the Proposed Rules and
Rule Amendments of the Department of
Natural Resources Governing Fishing

**REPORT OF THE
ADMINISTRATIVE LAW JUDGE**

The above-entitled matter came on for hearing before Administrative Law Judge Allan W. Klein on April 14, 1998, in St. Paul. Additional hearing sessions were held on April 15 in Rochester and April 16 in Baudette.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.31 to 14.20 (1996), to hear public comment, to determine whether the Minnesota Department of Natural Resources (hereafter "the Department") has statutory authority to adopt the proposed rules, whether it has fulfilled all relevant substantive and procedural requirements of law and whether the proposed rules are needed and reasonable.

David Iverson, Assistant Attorney General, 445 Minnesota Street, St. Paul, Minnesota 55101-2127, appeared on behalf of the Department. The Department's hearing panel included Steve Hirsch, Manager of the Fisheries Program, Mark Heywood, Regional Fisheries Manager at Rochester, Mike Larson, Area Fisheries Supervisor at Baudette, Mark Ebbers, Trout and Salmon Program Coordinator, and Kathy A. Lewis, Attorney.

Approximately 20 members of the public attended the hearing in St. Paul and of those 14 persons signed the hearing register. Approximately 65 persons attended the hearing in Rochester and 51 persons signed the hearing register. Approximately 34 persons attended the hearing in Baudette and 30 persons signed the hearing register. Each of the hearings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules.

The record remained open until May 6, 1998 for the submission of written comments. During the initial comment period the ALJ received numerous written comments from interested persons and the agency. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were then allowed for the filing of responsive comments. The agency did file a final comment. The agency did not elect to make any changes to the proposed rules. The record of this rulemaking closed for all purposes on May 13, 1998.

NOTICE

The Commissioner of the Department of Natural Resources must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Chief Administrative Law Judge's suggested actions to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the suggested actions, he must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Commissioner elects to adopt the actions suggested by the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Commissioner may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Commissioner makes changes in the rule other than those suggested by the Administrative Law Judge and the Chief Administrative Law Judge, then he shall submit the rule, with the complete record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Commissioner files the rule with the Secretary of State, he shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On October 20, 1997, the Department published a Request for Comments on a number of proposed fishing rules at 22 State Register 627. Exhibit 1. On February 3, 1998, the Department requested the scheduling of three hearing dates and filed the following documents with the Chief Administrative Law Judge:

- (a) the proposed rules certified by the Revisor of Statutes;
- (b) the Statement of Need and Reasonableness (SONAR); and
- (c) the Notice of Hearing to be issued.

2. On February 3, the Department also filed a request for approval of its notice plan with the Office of Administrative Hearings. The notice plan was approved on February 5, 1998.

3. The Department mailed a copy of the SONAR to the Legislative Reference Librarian on February 6, 1998. On February 18, 1998, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the agency for the purpose of receiving such notice.

4. On February 23, 1998, a copy of the proposed rules and the Dual Notice of Hearing were published at 22 State Register 1427.

5. On the first day of the hearing, the Department placed the following additional documents into the record:

- (a) the Request for Comments published at 22 State Register 627 (Exhibit 1);
- (b) certificate of the Department's mailing the request for comments to persons on the agency's rulemaking list (Exhibit 2);
- (c) Statewide News Release, dated November 5, 1997, including requests for comments and a special southeast region news release dated February 4 regarding trout (Exhibit 3);
- (d) the proposed rule, certified by the Revisor of Statutes (Exhibit 4);
- (e) the SONAR (Exhibit 5);
- (f) certification of mailing and a copy of the letter transmitting the SONAR to the Legislative Reference Librarian (Exhibit 6);
- (g) the Notice of Hearing as mailed (Exhibit 7);
- (h) the Notice of Hearing and copy of the proposed rules as published in the State Register (Exhibit 8);
- (i) the Administrative Law Judge's letter approving the notice plan and the Department's letter requesting that approval (Exhibit 9);

- (j) the Department's Certificate of Mailing, provision of additional notice, and certification of the mailing list as accurate and complete (Exhibit 10);
- (k) News Releases, dated March 17, 1998, announcing the planned rule and soliciting comments (Exhibit 11);
- (l) all written comments received by the Department in response to the Notice of Hearing (Exhibit 12);
- (m) all written requests for hearing received in response to the Notice of Hearing (Exhibit 13);
- (n) Notice of Hearing to those who requested a hearing, signed March 31, and Certificate of Mailing dated April 2 (Exhibit 14);
- (o) Statewide News Release, dated April 7, concerning the dates, times and places of the hearings (Exhibit 15);
- (p) a copy of Department of Natural Resources, Section of Fisheries, Investigational Report No. 378, dated August 1984, on "Effects of Continuous Fishing on the Walleye and Sauger Population in Pool 4, Mississippi River";
- (q) a copy of an article by T. Dotson, on "Mortalities in Trout Caused by Gear Type and Angler-Induced Stress", as published in the North American Journal of Fisheries Management, 2:60-65, in 1982; and
- (r) a copy of an article by M. J. Taylor and K.R. White on "A Meta-Analysis of Hooking Mortality of Nonandromous Trout", as published in the North American Journal of Fisheries Management, 12:760-67, in 1992.

Nature of the Proposed Rules

6. In this rulemaking proceeding the Department seeks to change its existing fishing rules in 18 separate areas. However, the public interest in these changes, and the requests for hearing, focused on three of the changes. They are: the season changes for southeast Minnesota trout streams; the changes for fishing regulations on the inland portion of Pool 3 of the Mississippi River near Hastings and Prescott; and the reduction in the walleye-sauger possession limit for the spring fishery on the Rainy River. Each of these three will be dealt with in detail below.

Statutory Authority

7. In the SONAR, the Department cited several different statutes in support of its 18 changes. Focusing on the three contested changes, for the trout rules, the Department cited Minn. Stat. §§ 97C.005, subd. 3 and 97C.401, subd. 1. The Administrative Law Judge finds that section 97C.005, subd. 3 does grant the Commissioner authority to establish seasons, limits, methods and other requirements for taking fish on designated trout streams. The Administrative Law Judge concludes that the Commissioner does have authority to adopt the proposed changes to southeastern Minnesota trout streams.

8. With regard to walleyes in Pool 3 of the Mississippi River, the Department cites the same two statutes.

Minn. Stat. § 97C.005 relates to special management waters. In subdivision 3 of that statute, the following grant of authority is made:

The Commissioner may, in accordance with the procedures in subdivision 2, paragraphs (c) and (e), or by rule under chapter 14, establish open seasons, limits, methods, and other requirements for taking fish *on special management waters*. (Emphasis added.)

Special management waters are defined in subdivision 1 of the statute as follows:

Subdivision 1. Definition; Designation.

(a) Special management waters are waters that:

(1) have been subject to special regulations that have been evaluated and proven effective under an experimental waters designation under section 97C.001; or

(2) are classified by the Commissioner for primary use as trophy lakes, family fishing lakes, designated trout lakes, designated trout streams, special species management lakes, and other designated uses.

(b) The Commissioner may designate any waters of the state including experimental waters, as special management waters. The Commissioner shall by rule establish methods and criteria for public participation in the evaluation and designation of waters as special management waters.

(c) Designation of special management waters under this section is not subject to chapter 14.

The statute goes on, in subdivision 2, to set forth a procedure for designating special management waters. There are a number of paragraphs which are not relevant to the Mississippi River, but those that are relevant, are as follows:

Subdivision 2. Public Notice and Meeting.

(a) Before the Commissioner designates special management waters, public comment must be received and, for waters other than those proposed to be designated as trout

streams or trout lakes, a public meeting must be held in the county where the largest portion of the waters is located.

* * *

(d) For proposed special management waters, other than designated trout lakes and designated trout streams, that were not previously designated as experimental waters, notice of the proposed designation must be given as provided in this paragraph. The notice must be posted at publicly maintained access points at least 90 days before the public meeting and during the open angling season for fish, the taking of which on the waters is proposed to be regulated under subdivision 3. Before the public meeting, notice of the meeting must be published in a news release issued by the Commissioner and in a newspaper of general circulation published at least once between 30 and 60 days before the meeting, and at least once between 7 and 30 days before the meeting. If a water to be designated is a lake with a water area of more than 1500 acres, or is a stream or river with a reach of more than six miles, a public meeting must also be held in the seven-county metropolitan area.

(e) The notices required in this subdivision must summarize the proposed action, invite public comment, and specify a deadline for the receipt of public comments. The Commissioner shall mail a copy of each required notice to persons who have registered their names with the Commissioner for this purpose. The Commissioner shall consider any public comments received in making a final decision.

The procedures for designating a water body such as Pool 3 of the Mississippi River, are in many ways, similar to the procedures for rulemaking. They involve the same basic concepts of advance notice, opportunity for public comment, followed by a decision. The major differences are that the special management waters designation process allows the Commissioner to make a decision on his own, without the imposition of fact-finding and a recommendation from an outside source (the Administrative Law Judge). The special management waters designation process also avoids many of the substantive requirements imposed by the rulemaking process, such as the preparation of a statement of need and reasonableness, a review of alternatives and impacted persons, etc. But a requirement of the special designation process which is not a requirement of the rulemaking process is that a public meeting be held "in the county where the largest portion of the waters is located". In addition, more "immediate" notice of the public meeting is required by posting at publicly maintained access points and during the open angling season.

9. With regard to walleyes in Pool 3 of the Mississippi River, Minn. Stat. § 97C.401, subd. 1, the other statute cited by the Department as authority for the proposed action, only grants the Commissioner authority to prescribe limits on the number of each species of fish that may be taken in one day and the number that may be possessed. It does not grant him the authority to change the dates for fishing.

10. Minn. Stat. § 97C.395, subd. 1 prescribes the open seasons for walleye and sauger as being from the Saturday two weeks prior to the Saturday of Memorial Day weekend to the third Sunday in February. However, Minn. Stat. § 97C.005, subd. 3 (quoted at length above) allows the Commissioner to establish seasons, limits, methods, and other requirements for taking fish on special management waters. Therefore, the Commissioner would have authority to adopt the proposed continuous season rule if the Mississippi were a “special management water”. But because the River has not gone through the required procedures for designation, the Commission does not have authority to adopt the proposed rule altering the seasons.

11. The statutory authority for the change in the Rainy River limit is found at Minn. Stat. § 97A.045, subd. 4, which allows the Commissioner place restrictions on the limits of fish that may be taken, possessed or transported from international boundary waters. The Administrative Law Judge concludes that for two of the three contested matters in this proceeding, the Commissioner does have authority to take the action proposed. The same conclusion is reached with regard to the uncontested proposals as well. However, the Administrative Law Judge concludes that the Commissioner does not have statutory authority to alter the season on the inland portion of Pool 3 of the Mississippi River without following the requirements for first designating it as a special management water.

Rulemaking Legal Standards

12. Under Minn. Stat. § 14.14, subd. 2, and Minn. Rule 1400.2100, one of the decisions which must be made in a rulemaking proceeding is whether the agency has established the need for and reasonableness of the proposed rule by an affirmative presentation of facts. In support of a rule, the Department may rely on legislative facts, namely general facts concerning questions of law, policy and discretion, or it may simply rely on interpretation of a statute, or stated policy preferences. ***Manufactured Housing Institute v. Pettersen***, 347 N.W.2d 238, 244 (Minn. 1984); ***Mammenga v. Department of Human Services***, 442 N.W.2d 786 (Minn. 1989). The Department prepared a Statement of Need and Reasonableness ("SONAR") in support of the amendments of the rule. At the hearing, the Department primarily relied upon the SONAR as its affirmative presentation of need and reasonableness for the proposed amendments. The SONAR was supplemented by comments made by Department staffers at the public hearing and in its written posthearing responsive comments.

The question of whether a rule has been shown to be reasonable focuses on whether it has been shown to have a rational basis, or whether it is arbitrary, based upon the rulemaking record. Minnesota case law has equated an unreasonable rule with an arbitrary rule. *In re Hanson*, 275 N.W.2d 790 (Minn. 1978); *Hurley v. Chaffee*, 231 Minn. 362, 367, 43 N.W.2d 281, 284 (1950). Arbitrary or unreasonable agency action is action without consideration and in disregard of the facts and circumstances of the case. *Greenhill v. Bailey*, 519 F.2d 5, 19 (8th Cir. 1975). A rule is generally found to be reasonable if it is rationally related to the end sought to be achieved by the governing statute. *Mammenga*, 442 N.W.2d at 789-90; *Broen Memorial Home v. Minnesota Department of Human Services*, 364 N.W.2d 436, 444 (Minn. Ct. App. 1985). The Minnesota Supreme Court has further defined the Department's burden in adopting rules by requiring it to "explain on what evidence it is relying and how the evidence connects rationally with the agency's choice of action to be taken." *Manufactured Housing Institute*, 347 N.W.2d at 244. The Department is entitled to make choices between possible approaches as long as the choice it makes is rational. Generally, it is not the proper role of the Administrative Law Judge to determine which policy alternative presents the "best" approach since this would invade the policy-making discretion of the Department. The question is rather whether the choice made by the Department is one that a rational person could have made. *Federal Security Administrator v. Quaker Oats Company*, 318 U.S. 218, 233 (1943).

In addition to need and reasonableness, the Administrative Law Judge must also assess whether the rule adoption procedure was complied with, whether the rule grants undue discretion, whether the Department has statutory authority to adopt the rule, whether the rule is unconstitutional or illegal, whether the rule constitutes an undue delegation of authority to another entity, or whether the proposed language is not a rule. Minn. Rule 1400.2100.

In this matter, no changes have been proposed to the rule after publication of the rule language in the State Register. Because of this circumstance, there is no need for the Administrative Law Judge to determine if new language is substantially different from that which was originally proposed. Minn. Stat. § 14.15, subd. 3 (1996). The standards to determine if the new language is substantially different are found in Minn. Stat. § 14.05, subd. 2 (1996).

Impact on Farming Operations

13. Minn. Stat. § 14.111 imposes an additional notice requirement when rules are proposed that affect farming operations. The Department indicated that the proposed rule would not affect farming operations. The proposed rule does not impose restrictions and has no impact on any aspect of farming operations. The Administrative Law Judge finds that the proposed rule will not impact farming operations in Minnesota, and finds that no notice to the Commissioner of Agriculture is required.

Classes of Persons Affected by the Proposed Rules

14. Minn. Stat. § 14.131 requires an agency adopting rules to include in its SONAR:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule; and
- (6) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

In its SONAR, the Department included its analysis performed to meet the requirements of this statute.

15. One commentator, Jay Dombrowski of Lakeville, filed a lengthy comment back in December suggesting that the proposed changes (which at that time included the possibility of a 12 to 16-inch slot limit for trout) were the result of an unreasoned decisionmaking process and that the Department failed to consider a number of the factors required by Minn. Stat. § 14.131. The Department's final list of proposed rules did not contain the trout slot limit. They were published in February. In March, Dombrowski submitted a revised comment (part of Ex. 12) focusing on some of the section 14.131 factors which he believed the Department had still failed to correct. The Administrative Law Judge has reviewed each of these, and finds that the Department has complied with the statute. While Dombrowski is correct in pointing out that some of the Department's responses are minimal, it must be remembered that the changes to the trout rules are but one of approximately 18 different topics covered in this proceeding. In order to address each of those topics in the detail which Dombrowski suggests, the Department would have had to produce a far more substantial SONAR than it did. The Administrative Law Judge believes that the goal of the regulatory analysis required by section 14.131 is to force the Department to consider, "through

reasonable effort”, the factors addressed there. The Department did make a reasonable effort to address the various section 14.131 factors for the numerous rule changes. Other of Dombrowski’s comments will be discussed in connection with the trout rule analysis, set forth below.

Analysis of the Proposed Rules

General

This Report is limited to the discussion of the proposed rule in light of the three issues that received significant critical comment. Persons or groups who do not find their particular comments referenced in this report should know that each and every suggestion has been read and considered.

Walleye and Sauger Limits for the Rainy River in the Springtime

16. Rules regarding walleye fishing on the Rainy River during springtime have changed from time to time as the Department attempts to balance angling opportunities and support for local businesses against a “safe” walleye harvest and crowding pressures caused by this unique opportunity for walleye fishing.

17. The Rainy River is the border between the United States and Canada. It connects Rainy Lake at International Falls to Lake of the Woods at Wheeler’s Point above Baudette. Currently, an angler is allowed six walleye and sauger in the aggregate, with not more than one walleye over 19.5 inches, except that no walleye over 19.5 inches may be taken from March 1 through April 14. The proposed rule would continue the six in the aggregate, with not more than one over 19.5 inches, but it would limit the springtime possession to two in the aggregate and no walleye over 19.5 inches.

18. The Department’s rationale for the change is a mix of biological and non-biological reasons. The Department has determined that the target harvest level (the “safe” harvest level) for walleye on Lake of the Woods is 430,000 pounds annually. The current annual harvest of walleye on Lake of the Woods is slightly higher than this, at 434,000 pounds. Therefore, there is a need to reduce the annual harvest by about one percent, or 4,000 pounds.

19. Back in April of 1982, the Department tagged 2,998 walleye in the Rainy River at Birchdale. The fish were then released, and persons were requested to notify the Department where and when they caught a tagged fish. Eighty-seven percent of the first year tagged returns were from Lake of the Woods, while 13% of the tagged returns were from the Rainy River. This indicates that most walleye spawning in the River, at least those spawning at Birchdale, are from Lake of the Woods.

20. The Rainy River offers a unique opportunity for pre-season walleye fishing in the northern part of the State. It is one of the few good walleye areas which is open in March and April. For that reason, and given the narrowness of the river (as compared to a large lake, for example) and given the limited number of access points, crowding has been a real problem. One local landowner wrote:

Large boats and motors throw wakes that erode my shoreline, muddy the water, and damage my boat tied to my dock. My lawn and river frontage had to be cleaned of fishermen's trash three times in ten days resulting in ten gallons of trash each time. I observed fishermen lighting a fire on my neighbor's land to cook lunch, with no burning permit or permission. No toilet facilities are available so you can imagine those results.

21. In response to these problems, a task force was organized in April of 1996, made up of local residents, business owners, county officers and Minnesota DNR representatives. They identified problems, set goals and made recommendations. State and county officials responded, and a number of the recommendations were acted upon.

22. The desire to keep the lake's walleye harvest at or below the safe harvest level and a desire to ease overcrowding over the spring fishery both contributed to the Department's proposal to lower the possession limit during the springtime. As the Department put it in their post-hearing comments:

There is certainly good biology behind the Department's position that the annual walleye harvest on Lake of the Woods-Rainy River system is somewhat above the safe level and needs to be reduced. On the other hand, the decision on how and where to reduce the walleye harvest (summer lake fishery, winter lake fishery, spring river fishery or some combination thereof) has socio-political ramifications. The Department wants to keep the Rainy River spring fishery open because it provides some of the best walleye angling opportunity in the State. However, there are many people who are against fishing for walleye during the spawning season . . . The Department is very concerned that legislative action to close the spring fishery may be taken if the proposal to reduce the possession limit is not implemented. This has influenced the Department to choose the option of reducing harvest during the spring river fishery as opposed to managing the harvest through other methods or restrictions.

* * *

The Department acknowledges that the goal of reducing walleye harvest could be accomplished by reducing harvest in the lake. However, the Department feels that the current proposal will affect

fewer anglers and businesses than one that would affect the lake. Also, as stated previously, the Department feels that the current proposal may help to prevent legislative action that would close the Rainy River spring fishery entirely.

23. The above-quoted language is the Department's response to critics on both sides of its proposal. On one side were a number of people organized by resort owners and other fishery-dependent businesses who argued that it was unfair to reduce the river harvest when the real goal was to lower the lake harvest. They argued that anglers from the Twin Cities and beyond would be unwilling to drive all the way to the river if they could only bring back two fish. On the other side were those who argued that the spring season should be closed entirely in order to protect the spawning walleye. They pointed out that many areas of the State were totally closed during the spawning season, and there was no reason why the Rainy River walleyes deserved any less protection.

24. Opponents who wanted to keep the limit at six, rather than lower it to two, challenged the Department's mathematics. They pointed out that approximately five percent of the lake walleyes migrate into the river for spawning, while 95% of the lake walleyes remain in the lake or spawn in other tributaries. They then noted that DNR creel survey data between 1990 and 1996 demonstrated that of the 433,900 pounds harvested, the breakdown was as follows:

Lake of the Woods – summer	315,400	72.7%
Lake of the Woods – winter	49,400	11.4%
Northwest Angle	21,600	5.0%
Rainy River – fall	27,000	6.2%
Rainy River – spring	20,500	4.7%

25. The opponents point out that 84% of the total annual walleye harvest is taken on the lake, 11% from the river and five percent from the Northwest Angle. This, coupled with the fact that the spring spawning run in the river only includes five percent of the lake fish, with 95% going elsewhere, leads the opponents to the conclusion that it is unfair to reduce the level on the river without reducing the level on the lake as well.

26. The Department estimates that in 1966, a possession limit of two would have impacted 56% of the anglers during the 1996 spring fishery, and reduced the walleye harvest by approximately 50%. The 1996 spring harvest on the river was estimated at 24,820 fish (which is the highest for many years), so a 50% reduction would lower the harvest by 12,410. Using average numbers, rather than the peak, a 50% reduction would lower the harvest by 10,250. This would more than cover the excess harvest identified as the problem. The Administrative Law Judge does not believe that these numbers demonstrate any fundamental flaw in the Department's position. Instead, what they do highlight is what everybody seems to agree on – that there are many more fish in the lake than there are in the river, that more fish are taken on the lake than in the river, but that the proposed rule focuses only on the river.

27. Minn. Stat. § 97C.403 (1997) was first enacted in 1988. It sets particular walleye restrictions for the Rainy River, including a springtime fishery, size limitations, and a directive to the Commissioner to attempt to negotiate an agreement with the province of Ontario. Former Representative Wally Sparby, who represented this area for some time, was involved in that legislation. He commented that he believes the current proposal is a “good compromise” between those who would close the river totally during the springtime and those who want higher limits.

28. The Administrative Law Judge finds that the Department has demonstrated a problem that needs attention – the threat to the Lake of the Woods walleye fishery from over-harvesting. Given that, the Administrative Law Judge further finds that the Department’s proposed solution – reducing the spring fishing pressure on the Rainy River – is a rational response to the problem. It is a reasonable one. There are other alternatives which the Department could have adopted, which are also reasonable ones. It is entirely appropriate that the Department considers non-biological factors when choosing among reasonable alternatives. The record demonstrates that a great deal of time and money has been directed at implementing the task force’s recommendations to relieve over-crowding. If the Department can choose a reasonable alternative which supports that effort, it makes sense. Finally, the Department’s choice coincides with Ontario’s rules for the river. That avoids confusion and avoids disputes over which side of the line a boat was on.

29. The Department did make two public relations errors in announcing its proposed rule change. The 1998 fishing regulations booklet (Exhibit 30) states that the limit has already been reduced from six to two (p. 42). Similarly, a Star Tribune article stated that the possession limit would be reduced in 1999, giving the impression that the change was a “done deal”. Both of these were mistakes, either on the part of the Department or on the part of a newspaper reporter. The Department issued a news release on February 10, 1998 to notify people of the mistake and the Baudette fishery’s office posted signs giving the correct information at all access points downstream from the Upper Sault Rapids on the river. (Department’s Initial Responses to Comments). These errors do not impact the reasonableness of the Department’s proposal.

Proposed Changes in Rules Governing Southeast Minnesota Trout Streams

30. The Department is proposing two changes to the seasons and other restrictions applicable to trout streams in nine Minnesota counties in the southeastern part of the state. First of all, the Department is proposing to add two weeks to the existing season by opening trout fishing on April 1. This two-week addition would be restricted to catch-and-release with barbless hooks. Secondly, the Department is proposing to modify the last two weeks of the existing season (September 15 to September 30) by limiting trout fishing during those two weeks to catch-and-release with barbless hooks. Contrary to some comments, the Department is not proposing to make any change in slot limits, nor is it proposing to prohibit bait fishing. All it is doing is

adding two weeks at the front, which are catch-and-release with barbless hooks only, and changing the last two weeks of the existing season to catch-and-release with barbless hooks only. The Department has withdrawn an early proposal for a slot limit because of public opposition.

31. The Department's argument in favor of its proposals is that adding the two weeks in the front will increase angling opportunities, but will not harm the resource. The Department does have evidence from certain experimental catch-and-release seasons during the winter months which have shown no detrimental impacts to trout populations. Thus, the Department reasons, there is no reason not to add two weeks in the spring throughout the region. One of the problems with catch-and-release, however, is the fact that some trout will die. The mortality rate varies, depending upon a number of factors. One of the factors is whether or not barbed hooks are used, or barbless hooks. While the data is not uniform, there is at least some support for the Department's belief that mortality will be lowered if barbless hooks are used. This is particularly true where bait is allowed, rather than just flies or lures. The Department believes that legislative intent and local angler sentiment favors the use of live bait, and thus the proposed rules do nothing to prohibit live bait. Part of the rationale, however, for requiring barbless hooks is to reduce the impact of live bait fishing during catch-and-release seasons. The Department is also pursuing a variety of educational efforts to teach anglers how to minimize mortality for catch-and-release angling.

32. The Department's rationale for making the last two weeks of the existing season catch-and-release with barbless hooks only, is to reduce the harvest of large brown and brook trout. These trout spawn in the fall, and concentrate during the last two weeks of the season in preparation for spawning. This makes them more vulnerable to fishing. Additionally, the Department stocks trout into streams in September, so that fish are available for spring fishing the following year. Just after they are stocked, these fish are vulnerable to angling pressure.

33. Opponents to the proposed changes raised a number of issues. Probably the most commonly voiced concern was that catch-and-release seasons favored a small elite group of fly fishers to the detriment of "meat and potatoes" anglers who liked to harvest and eat their trout. This criticism was particularly prevalent among those who were laboring under the misunderstanding that these proposed rules still included a slot limit. This perception arose because the original impetus for changing the rules came from Trout Unlimited and the Minnesota Trout Association. These groups had initially advocated adding two weeks of catch-and-release only fishing prior to the current trout opener, changing the last two weeks of the current trout season to catch-and-release only AND adopting a protected slot limit between 12 inches and 16 inches. The Department studied their proposals, solicited comments, and ultimately went along with the first two, but not the last one. Nonetheless, rumors and misinformation led some to believe that the Department was still proposing the slot limit, and this brought out negative comments from those who believed that trout between 12 and 16 inches were perfect for eating.

34. The fall catch-and-release proposal was criticized as unnecessary by a number of commentators who believed that trout populations are currently at high levels, fishing pressure is already low in the fall, and there is no need to restrict angling to catch and release. The Department's response was, essentially, that to the extent there is a desire to increase the population of large trout (such as those greater than 15 inches), then having a catch-and-release program for the particular time of the year when large trout are most vulnerable (the fall, as they are gathering to spawn) is justified.

35. Another criticism of the Department's proposal was that catch-and-release simply does not work, and that if the fish are not killed by exhaustion and damage from hooks, the squeezing and other trauma which accompanies attempts to unhook and release will impair their spawning in the fall. The Department responded with a variety of studies, including one recent "meta" study (which is a synthesis of a number of studies) which demonstrates that catch-and-release does work. The studies show that there are a variety of factors which affect mortality rates following catch-and-release but that research does not support the assertion (made by some at the Rochester hearing and in writing) that the best way to get trout in your creel is to stand downstream from a catch-and-release angler. The studies demonstrate that catch-and-release does, in fact, allow a substantial majority of the released trout to survive without impact from the catch-and-release event. Exact mortality rates vary, depending on a number of factors, and the Department is already pursuing angler education to minimize the mortality rates following catch-and-release.

36. Another comment voicing opposition to these proposals is that the hearings were not publicized adequately so as to alert non-affiliated (non-members of TU or MTA) anglers about the proposed changes. The Department's response is that the Department did receive a number of different comments (both pro and con) during the request for comment period, including a petition with over 70 names on it and that the Department received 52 requests for a public hearing from people who were opposed to the proposed rule, along with another seven who provided written comments. The Department mailed notices to its required list, along with notices to sporting goods store owners, sportsmen's clubs and other individuals known to be involved in trout fishing. It issued a news release publicizing the hearings. The news release was distributed to general news media in the state, outdoors and recreation publications, freelance writers and county auditors. A copy of the dual Notice of Intent to Adopt Rules was mailed to the Minnesota Sport Fishing Congress, Trout Unlimited, the Minnesota Trout Association, Fishing Funding Citizen Oversight Committee, Trout and Salmon Stamp Citizen Oversight Committee, TROUT and a variety of clubs and similar organizations around the State. Finally, those persons who did comment on the proposed rules or requested that a hearing be held were sent a separate notice, informing them that the hearings would go forward as scheduled. It is reasonable to assume that persons who bothered to write in would make an effort to spread the word that a hearing would be held. The Administrative Law Judge concludes that the Department has made a reasonable effort to announce the hearings and provide notice of it to interested persons.

37. The Administrative Law Judge concludes that the Department has demonstrated that its proposal for catch-and-release only with barbless hooks for an additional two weeks in the spring, and for the final two weeks of the existing season in the fall, is needed and reasonable. As with both of the other rules discussed above, the data in support of this rule demonstrates that predicting fish populations and predicting how changes in regulations will affect them is not a precise science. But that does not mean that the Department must wait until it can prove, beyond a shadow of a doubt, that its proposals will work before it can adopt them. Instead, the standard which the Department must meet is only that there is a problem which needs to be solved, and that its choice of solutions has a rational basis in fact. The Department has met both of these tests in connection with the proposed trout rules.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Natural Resources gave proper notice in this matter.
2. The Department has fulfilled the procedural requirements of Minn. Stat. § 14.14, and all other procedural requirements of law or rule.
3. The Department has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat §§ 14.05, subd. 1, 14.15, subd. 3, and 14.50 (i) and (ii). except that the Department has not demonstrated that it has statutory authority to change the walleye and sauger season on the inland portion of Pool 3 of the Mississippi River.
4. The Department has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 4 and 14.50 (iii).
5. There were no additions or amendments to the proposed rules suggested by the Department after publication of the proposed amended rules in the State Register. Therefore there is no substantially different language from the proposed amended rules as published in the State Register within the meaning of Minnesota Stat. §§ 14.05, subd. 2 and 14.15, subd. 3.
6. Any Findings which properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A Finding or Conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage the Department from further modification of the proposed rules based upon an examination of the public comments, provided that the rule finally adopted is based upon facts as appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed amended rules be adopted, except as provided in the Findings and Conclusions above.

Dated this 12th day of June, 1998.

ALLAN W. KLEIN
Administrative Law Judge

Reported: Taped, No Transcript Prepared

MEMORANDUM

The Administrative Law Judge prepared his factual findings relating to the need and reasonableness of the proposed changes to Pool 3 of the Mississippi River before he discovered the defect regarding statutory authority. The question then arose as to whether to discard those findings relating to need and reasonableness, or to make them available to all interested persons on the assumption that the Commissioner would go forward with the special management designation process. The material is presented below, in order that the Commissioner and all interested persons can consider it if the Commissioner decides to go forward with the special designation process. However, it should be understood that these are not technically binding Findings of Fact because the issue of need and reasonableness is now moot. Instead, they must be viewed as just one person's opinion of the record which was developed in the rulemaking process.

Pool 3 of the Mississippi River from Prescott to Hastings

A. Currently, the stretch of the Minnesota River from St. Paul to Iowa is governed by a myriad of different fishing rules, with varying seasons and size limits. This does create confusion among anglers and difficulties for enforcement personnel, particularly in Pool 3, which goes from the dam at Hastings down to the dam at Red Wing. Currently, between Hastings Dam and Prescott, "inland" fishing regulations apply. From Prescott down to Red Wing, "boundary water" regulations apply. But matters are further complicated by the fact that anglers freely move between Pool 3 and the Lower St. Croix River, which has yet a different set of regulations. One of the major differences is in the season for game fish species, such as walleye and sauger. Between the Hastings Dam and Prescott, the season runs (in 1988) from May 9 to February 14. However, from Prescott down to Red Wing, the season for walleye and sauger is continuous. The St. Croix River season runs from May 2 to March 1, 1989. Other differences involve possession limits and differences in the number of lines.

B. The proposed change would make fishing regulations on the stretch between Hastings Dam and Prescott the same as the regulations that apply from Prescott down to Red Wing. The most significant change is that there would be a continuous fishing season for walleye and sauger, which, as a practical matter due to ice, means that March and April would be added to the existing season.

C. The conservation officer at Hastings who is primarily responsible for the four-mile stretch between Hastings Dam and Prescott testified that there is widespread confusion about the rules on that stretch of the river. He checks several hundred anglers per year for compliance, and he finds that the majority of them are not local but are rather non-locals, and they are confused. He acknowledged that the local people do know the rules, but stated that they were in a minority. He believes that there is a problem that needs to be addressed. This was supported by other commentators. For example, a Terry Bartels from Hastings wrote of a hypothetical day spent on his boat with two clients from out of town. He describes what happens as they proceed south from north of the Hastings Dam to below Red Wing. While the letter is exaggerated to make a point, the point is that it is very hard for an ordinary person to grasp all the rules in this short stretch of river. The Administrative Law Judge concludes that the Agency has demonstrated that there is a problem with so many different rules in such a short stretch of river. The next question is whether the Agency's proposed solution is a reasonable one.

D. Commentators at the hearing urged that there were a number of preferable ways to solve the problem. They suggested that signage at boat landings, for example, would be an easy fix. They also suggested that handouts might be made available. They suggested that maybe changing some of the other rules to make them conform with existing rules for the Hastings-Prescott stretch could be accomplished. The primary motivation behind proposing these alternatives and opposing the continuous season was a sincere belief that opening up this stretch to year-round fishing would deplete the fish population in the long term because it would deprive the

walleye of the only protected spawning area (protected in the sense of no fishing) from St. Paul to Iowa. They pointed out that many of the State's fishing seasons are based on the concept of protecting fish during the spawning and pre-spawning periods, and they could not believe that the Department would be suggesting that such protection was not appropriate for "their" stretch of the river as well. The Department's response was that it has allowed year-round fishing for walleye and sauger from Red Wing to Iowa since 1967, and has carefully monitored populations in that stretch. A detailed study of that stretch, which was performed in 1981, concluded that the continuous fishing season had no adverse effects on population of either walleye or sauger, and that the abundance of walleye after 15 years of continuous fishing was similar to the abundance before it had been allowed. The study found other variables which affected populations and spawning success, such as water levels and temperature, but allowing spring fishing was not a factor. Ex. 16.

E. The Department also justified its proposal in terms of its statutory mandate to manage fish to ensure recreational opportunities for anglers (Minn. Stat. § 97A.045, subd. 1). The Department pointed out that this proposal would increase angling opportunities, rather than restrict them.

F. The Administrative Law Judge concludes that the Department has demonstrated that its proposal to alter the rules applicable to the Mississippi River between Hastings Dam and Prescott is a reasonable one. It is based on actual experience in the next pool downstream, which has been monitored and demonstrates that allowing walleye and sauger to be fished during the spawning season does not impair the populations available for anglers. While commentators did point out alternatives which they thought were better, the law allows the Department to choose among all feasible alternatives so long as its choice is demonstrated to be a rationally-based response to the problem. The Department has made that demonstration in this situation, and thus it may adopt its preferred alternative.

G. Both members of the Minnesota House of Representatives from the area (Jerry Dempsey and Dennis Ozment) urged that the Department give due consideration to the opposition from local residents which was presented through petitions, letters and telephone calls. The Department acknowledged this concern, but believed that the data from Pool 4 showed that the fears of reduced populations resulting from the change were unfounded. The Administrative Law Judge suggests that the Department undertake some sort of systematic monitoring of walleye and sauger populations in the area between Hastings and Prescott in order to demonstrate that the change is not harming the populations. The suggestion, however, is not a requirement that must be adopted in order to sustain the rule proposal – it is merely a suggestion in response to the widespread doubt about the wisdom of the Department's proposal.

AWK